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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
WILLIAM PATRICK KEALY, **DEBORAH KAY AKERS KEALY,**	**CASE NO. 01-41546-7** **CHAPTER 7**
DEBTORS.	
DEBORAH KAY AKERS KEALY,	
PLAINTIFF,	
v.	**ADV. NO. 02-7081**
UNITED STATES OF AMERICA *ex rel.* DEPARTMENT OF EDUCATION,	
DEFENDANT.	

MEMORANDUM OF DECISION

This proceeding was before the Court for trial on April 23, 2003. The plaintiff-debtor ("Debtor") appeared personally and through counsel, Paul Post. The United States of America, on behalf of its agency the Department of Education, appeared through Assistant United States Attorney Jackie A. Rapstine. The Debtor seeks a discharge of her student loan debt on the basis of undue hardship. At trial, the parties presented the Debtor's testimony, and submitted a number of exhibits. Having heard and considered the evidence, the Court is now ready to rule.

FACTS

The Debtor is a 48-year-old woman. She is four times divorced, and is the mother of three children, only one of whom, a ten-year-old, lives with her. She has been in one or more abusive relationships and has some psychological problems as a result of the severe abuse she suffered in at

least one of her relationships.

The Debtor graduated from high school in 1973. She received a Commercial Art certificate from the Salina Area Vocational Technical School, and completed a course in Internet/Desktop Publishing at the Manhattan Area Technical College. She then worked for a number of years at various jobs related to the training she had received.

In 1989, the Debtor enrolled in Bethel College as a full-time student, and received a Bachelor of Arts degree in Art in 1996, graduating with a 3.19 grade point average. She has obtained a teaching certificate in art. The Debtor is currently using her teaching certificate and is earning $27,000 per year. She intends to remain a teacher so long as she is able.

The Debtor incurred her student loan obligations while attending Bethel College. She repaid a small Perkins loan, but consolidated her remaining student loans with a total principal of $59,782.43. By April 10, 2003, accumulating interest had increased her student loan debt to $73,412.44. Other than the Perkins loan, the Debtor has made no payments on the loans.

Although the Debtor filed a joint Chapter 7 bankruptcy case with her then-husband, they were not living together then and had been separated for some time. They have since divorced.

According to the Debtor, sometime during the marriage to her co-debtor ex-husband but before she filed this proceeding, she asked the student loan servicing agent if she could make partial payments on her student loans. At the time, she said, her obligation was to pay $500 or more per month. She stated that she was told that making partial payments was not acceptable. Since she was not able to make full payments, she made none. During the marriage to her co-debtor, the Debtor and her husband filed joint tax returns showing combined income of about $74,000 for one year and

$79,000 for another year. No evidence was presented to show what their expenses were for those years. From the Debtor's testimony about their relationship during the second of these years, the Court gleaned that it was unlikely that her ex-husband would have voluntarily contributed funds for paying her student loans, even if their expenses were such that he could have.

Plaintiff is currently living in Section 8 (that is, government-subsidized) housing, and is paying the maximum charge under that program. It appears that her income must be near the maximum allowed to remain eligible for assistance under that program, so she would have to find non-government-subsidized housing if she received much of an increase in her income. In the past, she has personally qualified for Health Wave Insurance (another government-assistance program). Due to increased income, she no longer qualifies for coverage under that program for herself, but is still able to purchase such insurance for her three children. Although she has custody of only one of her children, she explained that the ex-husband who has custody of the other two has no health insurance coverage for them. She has received no monetary support from the father of the child living with her and in the past has assigned her child support rights to the Kansas Department of Social and Rehabilitation Services ("SRS"). She would hire an attorney to privately pursue that child's father for support, but cannot currently afford to pay a retainer to do so. Based on SRS's inability to recover support in the past, she does not hold high hopes for any substantial recovery from that father.

Although it will not be fully recited here, the evidence presented made clear that the Debtor has historically entered into relationships that ended badly for her, and that she made numerous poor choices in connection with those relationships. While she was eligible for the Health Wave Insurance, the Debtor was able to obtain counseling from a psychologist on a regular basis. Now that she has lost

that insurance, she is cannot continue such counseling because she cannot afford to pay for it herself. The Debtor takes several prescription drugs for her physical and psychological problems, and if she had enough money, she would like to continue counseling.

The Debtor's net income per pay period as shown by her pay stubs is $1616.78. In the past, she has received tax refunds, though, so her true net is close to $1800. Her monthly expenses, listed on exhibit two received at trial, are $2,000, excluding an insurance expense that is reflected as a deduction in arriving at her net pay.

For the most part, the Debtor's expenses are relatively modest and reasonable, and not subject to significant dispute. She does list among her expenses $100 per month for attorney fees, but this expense should end in the near future. Among other expenses that might be questioned are $50 for guitar lessons for the child living with her, an item that surely will cease in the foreseeable future, $25 per month allowances to each of her three children, two of whom will reach adulthood in the next several years, and about $100 per month in gift, vacation, and miscellaneous expenses. Other than these items, however, the Debtor has no regular surplus income that she could use to cover any unexpected expenses, such as replacing appliances. Furthermore, although she currently does not drive long distances, her 1993 Ford Escort has 188,000 miles on it, and undoubtedly will need either substantial repairs or to be replaced in the near future. This is a major unbudgeted item. It is also likely that, before her 10-year-old is old enough to leave home, expenses for that child will increase. In addition, once the child does leave home, the Debtor will probably not be eligible for Section 8 housing anymore, even assuming she will remain eligible for the next eight to twelve years before the child is grown.

The federal government now offers a number of repayment programs to student loan debtors. It appears the Debtor would qualify for the "Income Contingent Repayment Plan," the program that requires the lowest monthly payment of all the repayment programs. Under this plan, the Debtor's monthly payment obligation would be adjusted annually for twenty-five years under a formula based on the total amount she owes, her adjusted gross annual income, and the number of dependents she has. Currently, the plan would require the Debtor to pay more than $217.67 per month and, because her income is unlikely to increase in the foreseeable future except for any cost-of-living adjustments, this monthly obligation would stay about the same for the eight to twelve years that the child living with her will remain dependent on her. Once that child becomes self-supporting, the Debtor's monthly obligation would increase by some unknown amount, and she would have to make higher payments for the remainder of the twenty-five years. At the level fixed under this plan, the Debtor's payments would not cover the annual interest that is accruing on her loans, so her debt would negatively amortize, leaving her owing more after the twenty-five years than she owes now. If the Debtor made the required payments, the remaining student loan balance would be forgiven, generating forgiveness-of-debt income for her at that time. She would then be 73 years old.

DISCUSSION AND CONCLUSIONS

Student loan debts are excepted from discharge in Chapter 7 bankruptcy cases by 11 U.S.C.A. §523(a)(8), "unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents." "Undue hardship" is not defined in the Bankruptcy Code or controlling case law, but where appropriate, the Court will use the analytical framework established by the leading decision applying this provision, *Brunner v. New York State*

Higher Education Services Corp.[1] In that case, the Second Circuit adopted a three-part test for resolving the undue hardship question:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[2]

This test provides a method for assessing the level of hardship nondischarge would impose on a debtor and his or her dependents, but leaves significant questions unanswered. The first part of the test does not define what constitutes the "minimal standard of living" that should be allowed a debtor, or what income and expenses are to be considered. The second part does not specify what constitutes "additional circumstances" that might justify a discharge or how much is a "significant portion of the repayment period." The third part does not explain what repayment efforts amount to "good faith efforts." A number of decisions since *Brunner* have expressed views that are pertinent to the Debtor's situation. The Court is convinced a burden of debt that can never realistically be repaid constitutes an undue hardship.[3] It is not reasonable to require a debtor to pay all projected disposable income for life to retire student loans.[4] A court should also be hesitant to impose a spartan life on family members who

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[1]831 F.2d 395 (2d Cir. 1987).

[2]*Id*. at 396.

[3]*See Coats v. New Jersey Higher Education Assistance Authority (In re Coats)*, 214 B.R. 397, 403 (Bankr. N.D. Okla 1997); *Elebrashy v. Student Loan Corp. (In re Elebrashy)*, 189 B.R. 922, 926-28 (Bankr. N.D. Ohio 1995).

[4]*Brown v. Salliemae Servicing Corp. (In re Brown)*, 227 B.R. 540, 545 (Bankr. S.D. Cal. 1998), *aff'd in part, rev'd in part on other grounds*, 239 B.R. 204 (S.D. Cal. 1999).

do not owe the loans, particularly children, in order to secure repayment of the loans.[5] An inability to pay satisfies *Brunner*'s requirement of a good faith effort at payment.[6]

The Court is convinced the Debtor's projected expenses are reasonable and necessary to provide a minimal standard of living for herself and her child. She has demonstrated a need for most of the items included in her budget, and the Court believes that no more than about $200 to $300 worth of the items could be reduced or eliminated. Even those items—the attorney fees, guitar lessons, allowances for the children, gifts, vacations, and miscellaneous—are not excessive or luxuries, but are items that either will end relatively soon, or might possibly be reduced. However, eliminating nearly all of these slightly questionable items from the Debtor's budget would only bring her expenses down to about level with her income, and certainly not free up the $217 or more she would need to pay monthly on her student loan debt under the Income Contingent Repayment Plan. Furthermore, the Debtor's minimal budget leaves no room for unplanned expenses that are likely to arise in the near future, such as appliance or car repairs or replacements.

The Second Circuit did explain in *Brunner* that the "additional circumstances" required under the second step of the test must be "strongly suggestive of continuing inability to repay over an extended period of time."[7] The lower court had offered the following elaboration on this point:

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[5]*Windland v. United States Dept. of Education (In re Windland)*, 201 B.R. 178, 182-83 (Bankr. N.D. Ohio 1996).

[6]*Lebovits v. Chase Manhattan Bank (In re Lebovits)*, 223 B.R. 265, 274-75 (Bankr. E.D.N.Y. 1998); *Clevenger v. Nebraska Student Loan Program (In re Clevenger)*, 212 B.R. 139, 145-46 (Bankr. W.D. Mo. 1997); *Coats*, 214 B.R. at 404-05; *Brown*, 227 B.R. at 546-47.

[7]*Id*. at 396.

> Predicting the future, however, is never easy. Minimum necessary future expenses may be ascertained with some precision from an extrapolation of present needs, but unpredictable changes in circumstances such as illness, marriage, or childbirth may quickly wreak havoc with such a budget. Even more problematic is the calculation of future income. It is the nature of §523(a)(8)(B) applications that they are made by individuals who have only recently ended their education. Their earning potential is substantially untested, and because they are inexperienced they are in all likelihood at the nadir of their earning power. They may, like appellee, have had difficulty in securing employment immediately after graduation. Extrapolation of their current earnings is likely to underestimate substantially their earning power over the whole term of loan repayment.[8]

In the present case, however, the Court notes that at least half of the Debtor's prime income-producing years (including almost fourteen years since she began to incur her student loan debt) have passed, so it is substantially less likely that her income will unexpectedly increase in the future than it would be for a recently-graduated twenty-five-year-old. The Debtor's employment history and present job situation convince the Court that she is not likely to obtain significant increases in her income in the future, probably little more than cost-of-living adjustments.

Although the Debtor has made no payments on her present student loan debt, she did in the past pay off another student loan. Although it might appear that some money to pay on the debt would have been available while she was married to her latest husband, her testimony indicated it was less than certain that he would have let her rely on his income to enable her to do so. Her failure to pay was not the result of any bad faith in violation of *Brunner*, but was explained by her contacting the servicing agent to ask if partial payments would be permissible, and understanding that they would not.

At best, the Debtor's budget is in a state of equilibrium even before adding the expense of paying her student loans. Based on the Debtor's past history, particularly her emotional history and her

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[8]46 B.R. 752, 754-55 (S.D.N.Y. 1985).

past relationship choices, as evidenced by her testimony and the record, and the likelihood that her economic condition will remain static, it is unlikely that the Debtor will have any greater ability in the foreseeable future to service this student loan debt than she has now. That being the case, the Court concludes that the Debtor does not have the present ability to pay the student loan debt. Further, she will not have the ability to pay the student loan debt in the future. In all likelihood, any payment plan available to her would negatively amortize, leaving her with an ever-increasing debt to pay, upon which she would undoubtedly default. In short, she will never be able to pay this obligation and it would impose an undue hardship, financially and emotionally, on her and her child for her to be forced to try to do so. Her failure to make any payments on the debt did not result from bad faith, but from her inability to make the full payments called for on the debt and her understanding that partial payments were not acceptable. Under the evidence presented, the Court is convinced that the Debtor has satisfied all three parts of the *Brunner* test for undue hardship, so her student loan debt should be discharged.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by FRBP 9021 and FRCP 58.

Dated at Topeka, Kansas, this ____ day of May, 2003.

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JAMES A. PUSATERI
BANKRUPTCY JUDGE